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ABSTRACT

The Nassau Chapter of the New York Civil Liberties Union (NYCLU) is a state affiliate of the American Civil Liberties Union (ACLU), a national, non-profit, non-partisan organization that defends civil liberties in and out of the courtroom. The goal of the group is the advancement of civil liberties according to strict interpretation of the U.S. Constitution and the Bill of Rights. This handbook is designed to answer questions about constitutional rights and how these rights apply to the daily lives of citizens. Questions included in the handbook are those actually submitted to the NYCLU from the public and include: (1) why isn't pornography illegal? (2) why does the ACLU defend free speech for racists and totalitarians? (3) do student editors have freedom of the press? and (4) why should someone be denied a job because he or she is white? (NL)

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UNDERSTANDING CIVIL LIBERTIES

A Guide for the Perplexed

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"So what if the First Amendment does go? We still have twenty-five more."

Drawing by Dana Fradon 1979
The New Yorker Magazine, Inc.

SO 030 101

prepared by the
Nassau Chapter
New York Civil Liberties Union

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This handbook was prepared by the Nassau Chapter of the New York Civil Liberties Union, a state affiliate of the American Civil Liberties Union, a national, non-profit, non-partisan organization devoted, both in and out of court, to defending and advancing civil liberties under the Constitution and its Bill of Rights.

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INTRODUCTION

The purpose of this handbook is to answer some of the perplexing questions people ask about their constitutional rights and how these rights apply to their daily lives. Some people assume that anything unfair is also unconstitutional, or that every wrong, particularly a serious wrong, violates a constitutional right. Some feel that the Constitution itself, by assuring the rights of unpopular, even hateful, people, sometimes grants too much freedom.

We all believe in individual liberties in principle. We believe that each of us should enjoy freedom of speech and religion, that the accused should have a fair trial, that one's personal beliefs are nobody else's business, and that discrimination on the basis of race or sex is bad. It's only when we start applying those principles to everyday life - when my rights bump into your rights - that we run into trouble.

Most of the questions that follow have been posed by people who have asked us for information about rights or to explain the ACLU position on various public issues involving rights. The questions in this handbook are framed as people actually ask them of us.

Note: If your constitutional rights are violated, the NYCLU and its local chapters are available for information and aid (see Appendix C). You may also want to consult a lawyer.

What's a constitutional right, anyway?

Constitutional rights, or civil liberties, are individual rights that may not be violated or taken away by the government nor voted away by the people. They are embodied in the Bill of Rights and other amendments that were added to the U.S. Constitution in order to protect personal liberty from government power and from majority rule. Those rights include freedom of speech, religion, press and assembly, rights of due process, equal protection and privacy.*

Free speech means not just the right to speak freely, but to read, write, listen, use the public streets and parks for protest and parades, and express oneself "symbolically" as well. For instance, the U.S. Supreme Court has found that wearing a black armband to school to protest our government's Vietnam policy is a form of protected symbolic speech.

Religious freedom means that the government may not interfere with the practice of individual beliefs ("free exercise") nor take any religious position itself ("establishment") by favoring one religion over another or religious belief over non-religious belief.

Freedom of the press means that the government may neither censor nor compel printed speech. Because of limited access to the airwaves, there is some government regulation of radio and television, which does not affect newspapers, magazines and books. By and large, though, broadcast speech enjoys the same protection as printed matter.

Freedom of assembly means that individuals may associate with whomever they wish and may act together to increase their political effectiveness. Peaceful picketing of employers or businesses, demonstrations at abortion clinics, and mass marches on Washington to protest poverty or support civil rights are all examples of protected rights of assembly.

Due process means fair procedure. Criminal defendants are entitled to due process rights, which include freedom from illegal search and seizure (Fourth Amendment); freedom from double jeopardy, from self-incrimination and the unjust denial of life, liberty or property (Fifth); the right to a speedy and public trial by jury, to be presented with specific charges, to obtain friendly witnesses and cross-examine hostile witnesses, and to be represented by a

*The full text of the Bill of Rights plus some later amendments can be found in Appendix B.

lawyer (Sixth); and freedom from cruel and unusual punishment (Eighth). Due process rights also apply in civil (non-criminal) transactions between the government and the people (Fifth and Fourteenth).

Equal protection (Fourteenth) means freedom from discrimination on the basis of race, creed, color and sex.* Rights to equal treatment are generally known as civil rights or human rights.

It is important to remember that *only* the government is restricted by the Bill of Rights. For example, a police officer breaking into a house without a warrant violates the constitutional ban on unreasonable searches; a burglar doing the same thing violates the criminal law but not the Constitution.

Privacy is not mentioned in the Bill of Rights. Where do we get our rights of privacy?

While the word privacy does not appear in the Bill of Rights, the Supreme Court has nevertheless ruled that the Constitution confers privacy by protecting rights of belief and association, due process, and equal protection. The Court has further recognized beyond these specific provisions a general right of privacy. In simple terms, the Bill of Rights has an "umbrella" effect guaranteeing, in the words of Justice Louis Brandeis, "the right to be let alone - the most comprehensive of rights and the right most valued by civilized men."[1]

Every personal right, trivial or important, could not possibly have been named or anticipated in the Bill of Rights, which is a statement of broad principles. Birth control as a personal liberty, for instance, was unimaginable 200 years ago. Similarly, electronic eavesdropping as an abuse of privacy could not have been foreseen as a violation of the ban on unreasonable searches. In addition, such First and Fourth Amendment rights gain force from the Ninth Amendment, which recognizes that the people retain rights not explicitly named in the other amendments. This was the framers' way of making the Bill of Rights applicable to a future they could not foresee involving rights of privacy they could not describe.

*Discrimination based on other arbitrary grounds such as age, marital status or disability is prohibited by federal and state laws.

Why should one person be able to overturn a law that everyone wants? Doesn't the majority rule in this country?

In electing our representatives, in setting our domestic and foreign policy, the majority rules. But in establishing our constitutional system, the framers also recognized that elected officials, no less than dictators, could abuse their authority and violate the rights of the individual. The framers feared a "tyranny of the majority." Thus, individual liberties were deliberately set apart in the Bill of Rights to be beyond the reach of the majority and to protect the people as individuals from the power of the people as a whole. That means that minorities - even a minority of one - have rights that may not be overruled by the majority.

Recognizing that the people could be swayed by passion and prejudice, the framers designed a system of separate branches of government to check and balance each other. One of those checks is an independent court system. Thus, when state legislatures authorize school prayer or when school boards remove library books because of unpopular ideas, the Supreme Court reminds us that rights of speech and belief are not dependent on the popular will. If minorities had to win elections to secure their rights, church attendance might still be compulsory, political protestors might not be able to distribute literature and schools might still be legally segregated.

Why does the ACLU defend free speech for racists and totalitarians?

We protect free speech for those we despise in order to preserve free speech for ourselves. If we do not protect speech for a Nazi, we cannot protect it for a Martin Luther King. It is that simple.

Nothing in the First Amendment suggests that speech is protected only if it is true or loyal to the nation. If the government can silence the hated few, then it can silence its own critics, the merely unpopular, the political dissenter, ordinary people, you and me.

When the city officials of Skokie, Illinois in 1977 tried to prevent a small group of American Nazis from marching, they passed a law banning speech that "incited hostility" on the basis of race or religion, or that "provoked civil disorder." In effect, the law said, "If you get me so angry that I attack you, you may not speak."

But the Supreme Court has ruled unconstitutional

this "heckler's veto" that would allow anyone to stop any speech by simply announcing that he will react violently. Such a law would have prevented the early efforts of union organizers, the civil rights marchers in the South, the anti-Vietnam war demonstrators in Washington or Martin Luther King marching through racist Chicago neighborhoods. The First Amendment was intended to protect precisely such expressions of unpopular ideas.

When civil rights and anti-war demonstrators were threatened with violence and even death, the ACLU demanded that government protect the demonstrators based on earlier Supreme Court decisions upholding the right of an anti-Semite (*Terminiello v. Chicago*)[2] and an Ohio Ku Klux Klan leader (*Brandenburg v. Ohio*)[3] to make racist speeches in public. Time and again, in our defense of civil rights and anti-war marchers, we have come to rely on the protections extended to hatemongers in these and other decisions setting the limits of protected speech.

Speech that might make a hostile listener angry does not reach those limits and is therefore protected. But speech that urges a sympathetic listener to commit immediate violence ("incites to riot") does exceed those limits and is not protected.

Some fear that racists and fascists will come to power if allowed to speak. But denying them the right to speak makes us the very totalitarians we despise. The risk that accompanies freedom is the risk that people will make bad choices, but we cannot avoid that risk without eliminating democracy.

A strong democracy stays strong by safeguarding the speaker, good or bad. Rather than curb speech, we should guarantee that the law allows the utmost freedom of speech so that tyrants seeking or gaining office can be effectively opposed. Nothing is more fatal to bad ideas than defending their right to be heard while rejecting them on the merits. As Justice Brandeis said, the answer to bad speech is more speech, not coerced silence.

Why isn't pornography illegal?

While the term obscenity has been defined by law,*

* According to the United States Supreme Court, material may be found obscene if the reasonable person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interests; that it depicts sexual conduct in a flagrantly offensive way; and that it lacks any serious literary, artistic, political or scientific value. All three conditions must be met for a work to be classified obscene (*Miller v. California*).[4]

pornography has not, but it is the term most people use to mean sexually explicit material that some find offensive. The First Amendment right of free speech guarantees that no expression may be prohibited merely because its content is offensive. Freedom of expression would have no meaning if a minority, or even a majority, could prohibit material it finds objectionable.

Nevertheless, material that meets the legal definition of obscenity can be regulated to protect the interests of young children and unwilling or captive viewers. For adults, however, the private possession of such material in the home is protected, even though the producer of the material may be criminally liable for its publication and distribution. Although some, such as the Meese Commission Report of Pornography, claim that pornography causes crime, no correlation has ever been established. Material may be sexually explicit, it may be offensive and it may be pornographic without being legally obscene. Thus, if the material does not fall within the Supreme Court's definition of obscenity, its publication and distribution cannot be banned.

Do student editors have freedom of the press?

Not always. It depends on whether they are in public or private school and whether they are in college or high school. Publishers of private newspapers like *Newsday* make editorial decisions totally free from government control. A private university like Hofstra is just as independent as *Newsday*, giving school officials, not its student editors, the right to make editorial decisions, if they choose, for the student paper.

Public colleges like those in the SUNY system, on the other hand, are creatures of the state and must allow the widest possible academic freedom to their student editors, including the right to publish politically controversial material. And public high school editors have also enjoyed the same academic freedom for almost 20 years since the 1969 Supreme Court decision that prevented school officials from banning controversial material unless it was likely to cause "substantial disruption" of the education process (*Tinker v. Des Moines*).[3]

But a 1988 Supreme Court ruling, *Hazelwood v.*

Kuhlmeier,[6] has narrowed student press rights by allowing public school officials to prohibit material they feel is politically controversial or simply contrary to "sound educational policy." The *Hazelwood* decision does not apply to underground high school newspapers because they are not considered to be publications of the school, but expressions of the students.

While the *Hazelwood* case has reduced student press rights to a constitutional minimum, school officials or lawmakers remain free to grant public school editors the high standards of academic freedom they have enjoyed under *Tinker*. And, of course, the private institution can always give its editors complete academic freedom, not as a constitutional obligation but as a matter of good public policy.

What's wrong with a "moment of silence" in the public schools?

Nothing is wrong with a moment of silence by itself, but the U.S. Supreme Court has ruled that when silence becomes a substitute for silent prayer authorized by school officials, it violates the constitutional ban on the establishment of religion (*Wallace v. Jaffree*).[7] But what is the harm, if no one is compelled to pray, if the prayer is not prescribed, if it's only a minute? Besides, how can people be prevented from praying anyway?

No one is prevented from praying. It is not prayer that offends, but the government's involvement. Prayer is an individual, private act that a school board can neither compel nor prevent. No law can require students to pray or meditate on cue. But in the school setting, even a suggestion can be seen as a requirement.

Students are a captive audience and, particularly when young, defer to the teacher's authority and are subject to the "indirect coercive pressure to conform."* Teachers can call for a moment of silence as needed - to calm a class down after a recess or before a test - but the organized, daily, regular moment of silence imposed by law in some school districts has been found in the courts to have no purpose other than a religious one.

* Justice Hugo Black in the 1962 school prayer decision (*Engel v. Vitale*).[8]

The fact that the prayer might take only a minute does not pose any less danger to religious freedom. "It is proper to take alarm at the first experiment with our liberties," said the Court quoting James Madison in its school prayer decision. "Who does not see that the same authority which can force a citizen to contribute three pence of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" The Constitution can be offended by three pence or by a minute.

If you can't teach religion in the public schools, how can you teach "secular humanism"?

Secular humanism is many things to many people, but it is generally considered to be a system of thought that teaches principles such as respect for individual differences, independent thinking and self-reliance. A 1961 Supreme Court decision (*Torcaso v. Watkins*),[9] however, has been the source of much misunderstanding about whether it is taught as religion in the public schools.

In a footnote in *Torcaso* listing some "non-theistic" (not God-centered) religions, the Court included "Secular Humanism," but did not define it. Using this footnote, critics claim that the public schools, forbidden to teach God or religion, are actually teaching the religion of anti-religion, or "secular humanism." But a system of thought that is not based on God may be neither religious nor anti-religious: it may be neutral. And that is what the public schools are required to be. They may teach *about* religion as a force in human events, but they may not promote religion.

It is possible that a group of people could organize as a sect, call themselves Secular Humanists, meet regularly and function as a church. In that narrow circumstance, "secular humanism" could be defined as a religion. But that has nothing to do with the vast majority of public school teachers, themselves members of various organized religions, who teach the secular values of tolerance and independence. As the Court of Appeals said in reversing an Alabama judge who had banned 44 books charged with promoting the "religion of anti-religion," the message conveyed is one of

> a governmental attempt to instill in Alabama public school children such

values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance and logical decision making. This is an entirely appropriate secular effort. (*Smith v. Board of School Commissioners of Mobile County*).[10]

Why must a parent who pays for a parochial school also pay public school taxes?

Citizens pay taxes to the government, which then provides services for the public good - among them police and fire protection, roads and transportation, parks, sanitation, and public schools and libraries. These services are paid for by all taxpayers, not just by those who use them. Government could not function if individual citizens could decide which programs they wished to support. If people with no school-age children or with children in private school were not required to contribute to the support of public schools, the cost of maintaining them would be beyond the means of most families. It would cripple universal public education to which our nation is so strongly committed.

Freedom of religion means that no parent can be prevented from sending a child to a parochial school, nor can taxpayers be forced to support parochial schools. Exempting parents of parochial school children from public school taxes would amount to an indirect subsidy of religious education, because it would increase the amount that other citizens would have to pay to maintain the schools. The constitutional right to seek a parochial school education is not a right to have that education subsidized.

I work in a bank. Why can my boss search my bag at will but a police officer cannot?

As with students rights, an important distinction must be drawn between public and private institutions. The Constitution protects us *only* against actions of the government and its officials, be they federal, state or local. A police officer is a government official, a bank president is not. The police department, the school board, the civil service commission, the motor vehicle department, Social Security, the unemployment insurance office, are all examples of government bodies. Whether their role is as employer or provider of services, their power is curbed by the Constitution. Private employers and

store owners may search employees or customers without violating Fourth Amendment rights, though their searches may be regulated by state and local law.

Are constitutional principles ever applied to the private sector?

Though most constitutional principles apply only to government conduct, some have been enacted into laws governing private conduct. Equal protection is such a principle, as embodied in our local, state and federal laws banning discrimination by private employers, store owners and other places of public accommodation, real estate dealers, landlords, homesellers, creditors and insurers. In addition, labor contracts give union members due process and privacy protections when they bar unjust discipline and dismissals or the use of polygraph tests.* However, equal protection is the only constitutional principle that has been widely applied by law to the private sector.

Can my employer fire me for being sick or disabled? For any reason?

Yes and no. In New York, a private employer not subject to a union contract generally can fire an employee for any reason, for no reason, or even for an unfair reason, under the so-called employment-at-will doctrine.[11] Thus, you can be fired for being sick, for not being able to do your job because of a disability, because the boss does not like you, or for virtually any other reason.

However, there are a few important exceptions to this general rule. Various federal and state laws prohibit discrimination in private and public employment on certain grounds (e.g., race, religion, national origin, sex, age, marital status or disability) or in retaliation for actions such as supporting a union, complaining about job safety, or filing a discrimination charge. The New York State Human Rights Law, for example, prohibits discrimination on the basis of a current or past disability (real or perceived) that does not interfere with reasonable job performance. Moreover, union members generally may not be discharged except for "good cause." In New

* The Federal Polygraph Protection Act protects most *job applicants* in private employment against the random use of polygraph tests, and protects *employees* unless there is a specific incident and individualized suspicion.

York, private employees who disclose illegal or improper employer practices ("whistleblowers") are protected if their charge concerns public health or safety (i.e. a report of fraud alone is not protected).

In public employment some employees have job security under civil service law, which generally protects non-probationary employees against dismissal without good cause. Public employees without civil service protection can usually be dismissed unless the issue involves[12]

1) exercising a constitutional right, such as free speech, religion or assembly;

2) objecting to unconstitutional actions, such as unlawful search and seizure by the employer;

3) a "justified expectation" of job security;*

4) an accusation that could damage one's reputation; or

5) "whistleblowing" about certain illegal, improper or unsafe practices.

Why shouldn't an employer be able to test employees for drug use?

While the law generally does not ban drug testing in private employment, it is still a serious invasion of privacy. Taking a urine sample under the supervision of an observer is inherently intrusive and offensive. Moreover, the testing process can reveal much private information that an employer has no right to know, such as pregnancy, medical conditions or the use of prescription drugs. Even an employee's off-the-job use of illegal drugs should not be the employer's business, as long as it does not affect job performance.

Constitutional objections aside, drug tests are also unfair because they can falsely label the individual a drug user. "False positives" may result from unreliable test methods and from human error in collecting and testing the urine. Even the employee's use of prescription and certain over-the-counter drugs, foods such as poppy seed bagels, herbal teas and tonic water, or exposure to second-hand smoke can result in false positive tests.

Moreover, since drug tests can reveal only that a drug was used but not when it was used, the test has

* The employee has come to rely on the security of his job either because of long employment or the employer's implied or stated assurances.

no value in determining current impairment on the job. Safety concerns can be satisfied by giving job-related tests to evaluate coordination and alertness. In fact, relying on drug tests to assure safety is false comfort: drugs taken shortly before a test will not show up in the urine for several hours and will therefore remain undetected.

In public employment, employees and job applicants are protected by the Constitution, which prohibits unreasonable searches and seizures. Some courts have held that a public employer may not require a drug test without at least individualized, reasonable suspicion that the person is impaired on the job. Other courts have held that such tests can be required without reasonable suspicion for certain types of employees (e.g. police, firefighters, prison guards, aircraft controllers, drug enforcement officers) or certain industries (e.g. nuclear plants, horse racing).

Why should someone be denied a job because he or she is white? Isn't that reverse discrimination?

In the past few years, society has begun to act affirmatively to overcome the effects of slavery and its fallout of discrimination against blacks and other minorities. Affirmative action means giving special consideration to qualified minority members for a limited period of time. It does not mean accepting unqualified job or college applicants, but it may mean considering factors other than test scores. Nonetheless, these attempts are what some criticize as reverse discrimination.

Just as colleges, for the sake of diversity or fairness, take football players or violinists or rural students who score lower than others, the ACLU believes that society can also decide in the interest of fairness to include previously excluded racial groups. In fact, in other areas we have acknowledged special needs, giving compensation and care to the sick or disabled, and civil service preference to veterans. Recent court decisions recognize that race in this country has been a disability and requires special attention. Though some whites may be denied a particular job because of the added competition, that is not reverse discrimination. Discrimination is meant to exclude, affirmative action to include; the difference is crucial.

If society had been "color blind" throughout its history, we would not need affirmative action pro-

grams now. But it is generations too late for the notion of "color blindness" or racial neutrality to have any other effect than to preserve the status quo.

The question is not one of qualified whites vs. unqualified blacks but whether, within a qualified pool, one can make a racially conscious decision. If a black and a white are both qualified for the same job, it is not reverse discrimination to choose the black, when blacks have been underrepresented in that field.

As Supreme Court Justice Harry Blackmun said in the Bakke[13] decision:

> In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.

If everyone is protected against discrimination in employment, why are only some minorities eligible for affirmative action programs?

Almost everyone is protected against discrimination in employment because of race, national origin or sex, among other grounds. That means an applicant for a particular job may not be rejected because she is female or because he or she is black or Jewish or Polish or Italian. But affirmative action programs are narrowly and deliberately designed to remedy the underrepresentation in the workforce of a racial, ethnic or gender group prominent in a given area. An affirmative action program tries to distribute better jobs more fairly and to make the workforce more representative of the population it serves.

Such a program would be appropriate, for instance, if the female population made up fifty percent in a geographic area but only five percent of the workforce, or of union membership, or of civil service or of a particular industry in that area, or if large numbers were kept in menial or underpaid jobs. Affirmative action programs are also designed to end when the minority numbers in the workforce approximate their numbers in the targeted population.

If age discrimination is illegal, how can a store owner refuse to serve minors?

Age discrimination is illegal only in certain circumstances. Discrimination against anyone 18 years

of age or older is prohibited by New York state law in employment, public housing* and private, non-sectarian or public education. It is also barred by creditors and insurers-as-creditors except when age can be statistically related to credit worthiness.

Under the New York State Human Rights Law governing public accommodations (such as businesses that serve the public) a store owner cannot refuse to serve anyone because of race, creed, color, national origin, sex, disability or marital status. But age discrimination is not barred by this provision of the law, so store owners can refuse to serve young people or require that they be accompanied by an adult. Bar owners sometimes establish a policy of admitting women at a younger age than men. This is illegal not because it is age discrimination but because it is sex discrimination.

Why can some private clubs discriminate?

While the State Human Rights Law prohibits discrimination by public accommodations, strictly private clubs are not considered public accommodations and therefore can discriminate on any basis they choose. Whether a club is considered a public accommodation depends on the way it operates: for example, whether it advertises openly for members, whether it offers business, professional and educational functions as well as social, whether it derives substantial income from non-members, and whether members take charitable tax deductions for dues.

In 1988 the U.S. Supreme Court upheld a New York City ordinance (Local Law 63) holding that a club is not "distinctly private" if it has more than 400 members, provides regular meal service and earns substantial income by renting its facilities and serving meals to non-members to further trade or business. The Court acknowledged the City's compelling interest in assuring women and minorities equal access to the advantages and privileges of "leadership skills, business contracts and employment promotions." (*N.Y. State Club Association v. City of New York*).[14] Outside New York City, local laws must be enacted similar to New York's in order to hold private clubs to the same standard.

* Discrimination against families because they have children is barred in both public and private housing by the Real Property Law, Sec. 236.

How can the government restrict the private ownership of guns when the Second Amendment guarantees "The right of the people to keep and bear arms"?

The Second Amendment does not address the issue of the *private* ownership of guns. It states, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." The United States Supreme Court has interpreted this to mean that each state has the right to maintain a militia - a citizen army called to military service in cases of emergency (i.e. the National Guard). This is the *collective* right of the people to have certain weapons *collectively*, and does not mean that individuals have a right to have their own guns. Rights of privacy diminish where the object at issue is dangerous to others. Thus, lawmakers may regulate the licensing, sale, possession and use of guns and may even ban them altogether.*

Is it ever legal to tape record a phone conversation?

In New York state it is legal to tape record your own conversation, either on the phone or face-to-face, without telling the other person. It is illegal to tape record a conversation when no participant has consented, unless a court has given its permission. In short, "A" may record his conversation with "B" but may not record a conversation between "B" and "C." Only a law enforcement officer or agent may intercept or record a conversation and then only by court order. Laws of other states regulating wire tapping may differ from New York law.

Ownership of the telephone does not generally confer any special privilege. A husband may not record his wife's conversation with her lover merely because she is using the husband's phone. And an employer may not eavesdrop on or record an employee's personal conversation without asserting a valid "business necessity."

* The 7th Circuit Court of Appeals has upheld the right of a municipality to ban the private ownership of guns (*Quilici vs. Village of Morton Grove*).[15]

How can a state fund abortions for poor women when the Supreme Court has ruled that such funding is not a constitutional right?

When the Supreme Court ruled that abortions are legal but that the government does not have to pay for them, state legislatures were then free to reject public funding or enact it. The Supreme Court establishes minimum standards of liberty, but the government may pass laws that exceed those standards. That is, the Court provides "a floor below which rights may not drop, not a ceiling above which they may not rise." (*California Fed. v. Guerra*)[16]

If the Supreme Court rules that a law is unconstitutional, such as a law banning abortion, then no government body at any level may impose such a law. But the Supreme Court may also rule that a law is neither in violation of the Constitution nor required by it, such as the Medicaid policy funding abortions for poor women. Though Congress voted it down, several states including New York support such funding, as does the ACLU, in the belief that poverty should not prevent a poor woman from excercising her constitutional right to choose abortion.

Why must a minor get her parents' permission to get her ears pierced but not to get an abortion?

While the government recognizes the privacy of the family and the right of parents to make most decisions for their minor children, the government may also intervene when a parent's decision threatens the child's whole mental, physical and emotional future. This "compelling state interest" is raised when a mature teenager seeking an abortion fears that informing her parents will cause alienation, abandonment, even threats to her physical safety. That minor child needs the state's protection just as surely as does the child of a Jehovah's Witness who refuses to allow a blood transfusion, or the child with cancer whose parents elect quack remedies instead of accepted medical therapy. These children have long been protected by court rulings.

The state can only intervene when family conflict raises the gravest issue. Since there is no "compelling state interest" in pierced ears, the state will not intervene beteween parent and child. A teenager whose whole life will be affected by her decision, however, must be able to choose freely whether to

terminate or complete her pregnancy, with or without her parent's knowledge or consent.

Isn't it inconsistent to oppose the death penalty but favor the right to abortion?

It is only inconsistent if one equates the legal rights of a fetus with those of a live-born human being. Opponents of abortion hold that both life and rights begin at conception. But when human life begins is a matter of personal belief, when rights begin is a matter of law. The question then is not when life begins but when life becomes a person in the eyes of the law, entitled to its full and equal protection.

In its 1973 decision in *Roe v. Wade*,[17] the U.S. Supreme Court ruled that a fetus is not a legal person until it can survive outside the womb. The court did recognize some regulatory role for the state in late pregnancy. But the decision reserved the full protection of the law for the point at which potential life becomes a person, at live birth.

For those who support the right to choose abortion, then, there is no legal equation between a fetus and a human being, and therefore no inconsistency in supporting a woman's right to privacy and to control her own body while opposing the official execution of a human being.

If the death penalty deters crime, isn't that reason enough to have it?

If the death penalty really deterred violent crime, the principal constitutional argument against it, the Eighth Amendment's prohibition against cruel and unusual punishment, might be more difficult to sustain. To a reasonable individual, the threat of death or even of years in prison would be a deterrent to crime. In fact, to anyone considering the consequences of his acts, the thought of losing one's freedom would be as effective as the thought of losing one's life.

But killing is not a reasonable act. Generally, it is committed out of passion, when logical thinking is suspended, or it is planned carefully to escape detection. In fact, the threat of death does not ordinarily deter an individual who simply does not expect to get caught. That is why, despite popular belief, the death penalty does not reduce the rate of murder.*

* The crime that most people fear - random street crime involving assault, robbery, even rape - is not subject to the death penalty. Only murder, the intentional, deliberate killing of a human being, is considered a "capital" crime, punishable by death.

Here are some facts: Death-penalty states do not have a lower murder rate than non-death-penalty states. The most recent study (Bureau of Justice Statistics, 1986) shows that of the ten states with the highest murder rate, eight have a death penalty. Moreover, in the ten states with the lowest murder rate, seven have no death penalty. Nor is there any greater rate of attack on police officers, prison guards or prisoners in states with no death penalty.

The inescapable conclusion is that the supposed deterrent effect of the death penalty is not found in real life. It is the prospect of swift, sure punishment, not the severity of it, that deters crime. Executing a murderer does, of course, prevent that individual from committing future crime; but since so few murderers ever commit another violent crime, we would have to put to death thousands to stop the unpredictable few who would repeat.

In addition, the death penalty in practice is commonly administered in violation of the guarantee of equal protection. It is used far more often when the killer is black or when the victim is white. And it is applied inconsistently: it is not used against all of the worst offenders, or against only the worst offenders, and it is used far more against poor offenders than rich ones. It has caused the death of innocent people and is itself a form of cruelty.

Without deterrence, then, the ACLU believes that a punishment that is often discriminatory and arbitrary and always irreversible and cruel has no place in a civilized society.

Why should defendants go free because of "legal technicalities"?

What some people might consider "technicalities" are often basic constitutional rights. Courts sometimes overturn convictions not because judges are "soft on crime" but because the police or prosecutor have engaged in serious violations of due process, such as denying access to an attorney, coercing a confession or conducting an illegal search and seizure.

Due process is necessary to protect our basic principle that a suspect is innocent until proven guilty. If you were mistakenly arrested for a crime you did not commit, or you were the victim of a witness or government agent who lied, you would want all the safeguards due you to clear your name. Since we do not know ahead of time which suspects are innocent and which guilty, we give due process to all suspects

to protect the innocent.

The government has the burden of obeying the law when prosecuting people for breaking it. Supreme Court Justice Antonin Scalia, a conservative appointed by President Reagan, ruled that "the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." If that means that occasionally a guilty person may go free, the response must be to improve police practices so that the guilty are convicted by their own actions and not by the illegal procedures or shortcuts of the police or prosecutor.

What are *Miranda* rights? When does a police officer have to read you these rights?

If you are arrested or merely taken into custody and questioned by the police, no information you give may be used against you unless you are first informed of your rights. These are called *Miranda* warnings (after a Supreme Court decision).[18] The police are required to give *Miranda* warnings *only at the time they decide to question you*, other than asking your name and address. The *Miranda* rule states that:

1) You have the right to remain silent.

2) Anything you say can be used against you.

3) You have the right to have a lawyer present when you are questioned.

4) If you cannot afford a lawyer, one will be appointed before any questioning begins.

The police can question you without an attorney present only if you voluntarily and knowingly waive your rights, which the police must determine by asking if you understand each of the rights read to you and if you wish to give them up and talk. Even if you have agreed to talk, you still have a right to change your mind and stop talking at any point in the questioning.

Miranda rights are based on two constitutional protections. Under the Fifth Amendment, in any criminal proceeding you have the right to remain silent and cannot be forced to testify against yourself. Under the Sixth Amendment, you have the right to an attorney.

If you are questioned in violation of these rules, then the police may not use any evidence obtained

from you against you in court. In some states, including New York, if the police know that you are already being represented by an attorney on a pending criminal charge, you may not waive your *Miranda* rights without the presence of your attorney.

Why shouldn't you answer a police officer's questions or allow a search if you have nothing to hide?

The law does not require you to permit a search (without a warrant) or answer a police officer's questions, except perhaps for giving your name and address. It is up to you whether to cooperate in order to avoid being given a "hard time." But even if you think you have nothing to hide, you might unknowingly provide information that could be used against you, such as admitting you were at the scene of the crime or that you knew the victim. Or, if something you have said is rephrased by the police, you may agree to it without realizing that it could be damaging.

If an officer insists on questioning or searching you or taking you to the station house against your will, you should advise the officer immediately that you wish to speak to a lawyer. It is important to remember that in a free society a citizen does not have to respond to a police officer. If you are arrested, the police officer has a right to search you but you still have a right to remain silent. However, you will not be considered for release unless you give your name and address.

Is it ever legal to resist arrest?

Yes, but it is not advisable. In many states, including New York, the law forbids the use of physical force against a police officer to resist even an unlawful arrest. Technically, you are allowed to resist an unlawful arrest by verbal protest or by walking away, but without the use of physical force. However, since you may not be able to determine what the law considers a valid arrest, you are advised to save your challenge for the courtroom.

Why shouldn't a police officer's search be legal if it is conducted in "good faith"?

One of the legal "technicalities" of our system is the Fourth Amendment's requirement that the government generally obtain a search warrant based

on probable cause (good reason) before searching or seizing a citizen or his property. This is to prevent "fishing expeditions," or general searches of the innocent and guilty alike to find the guilty. If the search is illegal, the Supreme Court has ruled, then the evidence seized must be excluded at trial. This exclusionary rule has served for the past 25 years to deter illegal searches and seizures by the police.

Some view the rule as an obstacle to securing convictions and argue that the good faith of the police officer should protect the evidence even if the search turns out to be illegal. If the officer thought he was obeying the law, the argument goes, that should be good enough.

But it isn't. Under our system, ignorance of the law is no excuse for breaking it, either by a citizen or by a police officer. The same officer who tickets a driver who did not realize he was exceeding the speed limit must himself be governed by the law of search and seizure. He cannot claim good intentions any more than the driver who did not knowingly drive too fast.

In 1984, the Supreme Court granted under the federal Constitution a limited exception to the exclusionary rule for warrants that turned out to be defective though issued by a judge in good faith (*U.S. v. Leon*).[19*] New York state, however, does not recognize this exception, using its authority to grant more protection to its citizens than the Supreme Court requires as a minimum.

Over the years a few highly publicized cases in which suspects are freed because of inadmissible evidence have contributed to a public impression that many criminals have been released on "technicalities," but in fact only a small fraction of criminal cases are affected by the exclusionary rule, and the rule has tended to keep police to high standards of procedure.

Why is the standard for searching a house stricter than for searching a car?

When William Pitt declared that the poorest man in his cottage may not be able to keep out the wind or the rain but he may keep out the King of England, he defined the basis for the Fourth Amendment's ban on "unreasonable searches and seizures" of people,

* In a strong dissent, Justice William Brennan warned that the "reasonable mistake" exception to the exclusionary rule "will tend to put a premium on police ignorance of the law."

their houses, papers and effects. The police can search your home only after obtaining from a judge a search warrant based upon probable cause (good reason), or without a warrant if they have reason to believe that evidence is about to be destroyed. A warrant must specify your name and address, the room(s) to be searched, the items sought, and the period of time the warrant is in effect.

Not all your property enjoys this same high standard of protection as your house, however. Because your car can be driven away with potentially incriminating evidence, it may be searched without a warrant. Probable cause to believe that the car contains something illegal is sufficient grounds to conduct a search. If the police stop you for a traffic offense but notice something illegal in plain sight on the seat of the car, they may search you and your car without a warrant. Car searches involve such a variety of circumstances that it is not possible to list here all the court decisions determining what is legal or illegal. However, if there is an illegal search of your car or other property, the evidence seized cannot be used against you in court.

What's wrong with denying bail to a "dangerous suspect?"

The purpose of setting bail is to ensure a defendant's appearance in court. Under our law a suspect is presumed innocent until proven guilty. In 1987 the Supreme Court (*U.S. v. Salerno*)[20] permitted pre-trial detention on grounds of "dangerousness." The ACLU believes its decision dilutes that historic principle.

Jailing untried suspects is punishment for unproven guilt despite the Court's claim that such jailing is meant to protect society, not to punish the suspect. Deprivation of freedom by imprisonment is punishment no matter what it is called. And ironically it is punishment not for the crime committed, but for a crime not yet committed based on a prediction of *future* dangerousness. Studies show that no one - not psychiatrists, nor lawyers, nor judges - can predict dangerousness with enough reliability to justify holding a given suspect.

Moreover, who is a dangerous suspect depends on the judge's conclusion. An Arab might be dangerous to a Jew, an Armenian to a Turk, an Irishman dangerous to an Englishman. The result would be the arbitrary imprisonment of people who are not

dangerous. An example is the jailing of 400,000 Japanese-Americans during World War II because officials thought they might be dangerous to the rest of us, though no German-Americans were similarly imprisoned.

In New York, the law adheres to the original purpose of setting bail to ensure a defendant's appearance in court. The court considers the defendant's reputation, employment record, assets, ties to family and community, past criminal record, prior flight to avoid prosecution, the strength or weakness of the evidence and the possible sentence. By using relevant and reasonable standards, New York has attempted to avoid unjustified imprisonment before trial based on prejudice rather than fact.

We hear a lot about the rights of defendants. Don't victims have rights, too?

Whatever claims crime victims may assert do not derive from the Constitution, which protects those, like suspects, under the government's authority and therefore subject to its abuse. But more and more we recognize that, even without constitutional claims, victims of crime need the government's attention beyond the role they play in prosecuting the defendant.

Under our criminal justice system, a criminal act is a wrong perpetrated against society, so the job of dealing with the accused belongs to public officials - police, prosecutors, judges and corrections agencies. Though neither prosecutor nor plaintiff, a crime victim serves as a witness and otherwise assists the prosecution. If convicted, the defendant may be ordered to pay restitution and the victim may use the conviction as proof of injury should s/he wish to bring a civil suit for further damages.

In addition, several states have set up compensation agencies. In New York, the Crime Victims Board can compensate victims of violent crimes for non-covered medical expenses, including counseling services, lost earnings (up to $400 a week to a total of $30,000), occupational rehabilitation up to $3,000, personal property up to $500 and transportation expenses for court appearances.

A victim's survivors may be compensated for burial expenses up to $2,500, and Good Samaritans, for property losses up to $5,000. Senior citizens need not suffer any physical injury to be compensated. Any compensation, however, would be reduced by

the amount received from the defendant, from insurance, or from public funds (1989 figures).

If double jeopardy is illegal, how can some people be tried twice for the same crime?

The Fifth Amendment protects a person accused of a crime from being "subject for the same offense to be twice put in jeopardy of life or limb." If a person is found not guilty, he cannot be tried again for the same crime. This applies to criminal cases in both federal and state courts. (Double jeopardy has no application in civil cases.)

But a defendant may be tried a second time for the same crime if a jury cannot reach a verdict (hung jury); if a judge properly declares a mistrial; or if, on the defendant's appeal from a conviction, the higher court orders a new trial. In addition, a defendant's acts may lead to charges under both federal and state law, which could result in acquittal in one court and a separate trial and possible conviction in another.

If criminal defendants are entitled to a trial by jury, why are some tried before a judge?

In New York state courts, a trial by jury is available to any defendant in a criminal case where the penalty can be more than six months in jail. Some defendants do not want a jury; they may choose to be tried by a judge alone. The choice is the defendant's. In federal court, the prosecutor must also consent if the defendant elects to be tried only by a judge.

Is every poor person involved in a legal dispute entitled to free legal representation?

No. Only those accused of crimes or involved in certain Family Court matters are entitled to Legal Aid attorneys or court-appointed attorneys.* Under 1989 Legal Aid guidelines in Nassau County, a poor person is defined as an individual earning less than $9,500 or a family of four earning less than $19,800, despite car or home ownership.

Poor people with problems securing government benefits such as public assistance, Medicaid, food

* The right to an attorney is found in the Sixth Amendment's provision of "assistance of counsel" in all criminal prosecutions. The Supreme Court applied this to poor people in its 1963 decision, *Gideon v. Wainwright.*[21]

stamps or disability benefits or involved in landlord-tenant disputes may be eligible for (but are not automatically entitled to) representation by the Legal Services Corporation, a federally assisted program known on Long Island as Nassau-Suffolk Law Services. Under 1989 Law Services guidelines, a poor person is defined as an individual earning less than $6,875 or a family of four earning less than $14,000. (See telephone book for Legal Services office in your area.)

Why are people who commit the same offense treated differently in different states?

Under our system, each state establishes its own criminal code, defines criminal acts, fixes the age of criminal responsibility and sets punishment. For example, the minimum age in most states for a person to be considered an adult offender is 18 but can be as young as 16, as it is in New York and a few other states. Thus, a person arrested for possession of marijuana in one state may be treated as a juvenile but in a neighboring state as an adult.

Even in the same state, people who commit the same crime may be treated differently. In New York, for example, most people who commit crimes under the age of 16 are considered Juvenile Delinquents and will be referred to Family Court. However, a person as young as 13 who is accused of murder may be treated as an adult, and those 14 or 15 may be treated as an adult for other violent crimes as well.

On the other hand, those who are 16, 17 or 18 may be designated Youthful Offenders if they are first-time offenders or if there are extenuating circumstances. Like Juvenile Delinquents, they will not have a criminal record.

Can I sue the police for "false arrest" if I'm acquitted of the charges?

A police officer cannot be liable for false arrest merely because the person arrested and prosecuted is not convicted of the crime. You may have a basis for a civil suit if the arresting officer had no probable cause (reasonable grounds), used excessive force or acted with malicious intent (e.g. harassment, retaliation, or discrimination).

Probable cause might be satisfied, for instance, if you are arrested because you match the physical

description of the suspect or because you are wearing similar clothes and driving a similar car. Probable cause would not be satisfied, however, if you are arrested because you are a black simply walking in a white neighborhood.

In any case, whether or not there is a basis for a civil suit, the district attorney can still charge the arresting officer with violations of criminal law, though this rarely happens.

Why can't a judge be sued for an unjust decision or for unfair treatment?

Judges can be held accountable in two ways: their decisions can be appealed to a higher court and their courtroom behavior can be reported to a state agency. But judges must be free to exercise their authority without having to worry about being sued by the losing party.

A system that shields the judge from personal liability while allowing for review by a higher court protects both the judge and the judged. As for the judge's courtroom behavior, any unfair treatment can be reported to the New York State Commission on Judicial Conduct, which has the power to discipline judges.

In 1988, however, the U.S. Supreme Court ruled that judges could be sued for their administrative, as opposed to judicial, decisions. In *Forrester v. White*,[22] the Court ruled that if a judge has the authority to hire probation officers, he may be sued for a discriminatory hiring decision. That is, a judge who acts as an employer or in any other capacity than deciding cases is not immune from suit in those areas.

APPENDIX A

CITATIONS

1. *Olmstead v. United States*, 227 U.S. 438 (1928)
2. *Terminiello v. Chicago*, 337 U.S. 1 (1949)
3. *Brandenburg v. Ohio*, 395 U.S. 444 (1969)
4. *Miller v. California*, 413 U.S. 15 (1973)
5. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969)
6. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)
7. *Wallace v. Jaffree*, 472 U.S. 38 (1985)
8. *Engel v. Vitale*, 370 U.S. 421 (1962)
9. *Torcaso v. Watkins*, 367 U.S. 488 (1961)
10. *Smith v. Board of Commissioners of Mobile County*, 827 F.2d 684 (1987)
11. *Murphy v. American Home Products*, 58 N.Y. 2d 293 (1983)
12. For protections for public employees, see generally *Board of Regents v. Roth* 408 U.S. 564 (1972) and *Perry v. Sindermann* 408 U.S. 593 (1972).
13. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)
14. *New York State Club Assn. v. City of New York*, 108 S.Ct 2225 (1988)
15. *Quilici v. Village of Morton Grove*, 695 F.2d 261 (1982)
16. *California Fed. Savings & Loan Assn. v. Guerra*, 479 U.S. 272 (1987)
17. *Roe v. Wade*, 410 U.S. 113 (1973)
18. *Miranda v. Arizona* 384 U.S. 436 (1966)
19. *United States v. Leon*, 468 U.S. 897 (1984)
20. *United States v. Salerno*, 481 U.S. 739 (1987)
21. *Gideon v. Wainwright*, 372 U.S. 335 (1963)
22. *Forrester v. White* 484 U.S. _____ (1988)

APPENDIX B

THE BILL OF RIGHTS

Passed by Congress, September 25, 1789;
Ratified by the States, December 15, 1791.

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

Second Amendment

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Third Amendment

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

Seventh Amendment

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Ninth Amendment

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Tenth Amendment

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Later Amendments Affecting Civil Liberties

Thirteenth Amendment

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immuinities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fifteenth Amendment

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Nineteenth Amendment

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Provisions of Article I in the Original Constitution Affecting Civil Liberties

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

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APPENDIX C

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